

## **Changing the Child's Domicile or Residence**

### **Change of Legal Residence (100 miles)**

The Child Custody Act, MCL 722.31(1) states, "A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued."

### **Change of Domicile**

According to Michigan Court Rule, MCR 3.211(C)(1), "A judgment or order awarding custody of a minor must provide that (1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor...."

#### **Interpretation:**

With two exceptions, a parent may move a child to another location. The first exception is the court rule requirement that a parent who has custody of a child may not change the child's permanent residence from the state of Michigan until the judge approves the move. The second exception is the statutory requirement that a parent whose custody or parenting time is governed by a court order may not move the child to a location more than 100 miles from the other parent's residence until the judge approves of the move.

There is no requirement for court approval for a move to another place in Michigan when:<sup>1</sup>

- The other parent agrees to the move.
- The judge ordered sole legal custody to one of the child's parents.
- The parents were already living 100 miles apart when the judge decided custody.

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<sup>1</sup> MCL 722.31(2) & (3).

- The move results in the child's two legal residences being closer to each other than before the move.

If the custodial parent wants to move the child to another state, even to a location closer than 100 miles from the other parent's residence, the court must approve the move based on the following factors, commonly referred to as the *D'Onofrio* test:<sup>2</sup>

- **Whether the prospective move has the capacity to improve the quality of life for both the child and the relocating parent.** This factor does not require proof that an actual improvement in the quality of life will occur, rather the potential for improvement is all that is necessary.<sup>3</sup> Under this factor, an appropriate consideration is the financial benefit of a move,<sup>4</sup> including the attendant ability of a parent to cut back on work hours and spend more time with the children,<sup>5</sup> or the ability to further a parent's career.<sup>6</sup> However, financial aspects of the move are not an exclusive measure of the potential for improvement of the life of the child and parent. When a prospective move presented the custodial parent with a larger salary, less demanding hours, increased educational opportunities and allowed the children to attend a larger school, more church activities, violin lessons, and a longer skiing season, the court found that the day to day presence and relationship

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<sup>2</sup> The test is named for a New Jersey case. *Anderson v Anderson*, 170 Mich App 305 (1988), adopted the *D'Onofrio* test as the standard to be used in Michigan. Although two earlier cases used other tests, (see e.g., *Hutchins v Hutchins*, 84 Mich App 236 (1978) (Beasley, J concurring) (best interests factors); *Watters v Watters*, 112 Mich App 1 (1981) (Glaser, J dissenting) (adopting four pronged test as a guide but requiring best interests of child factors to be considered), the prevailing view since that time has been the four pronged test stated here. The test has been stated somewhat differently depending on which cases have been cited (compare for instance the language in *Dick v Dick*, 147 Mich App 513 (1985) to the language in *Anderson*, supra.).

<sup>3</sup> *Phillips v Jordan*, 241 Mich App 17 (2000) (Phillips, J, dissenting) (marriage and potential career in real estate would allow part-time work to conform to child's school schedule).

<sup>4</sup> *Scott v Scott*, 124 Mich App 448 (1983) (husband's job in Ohio paid more); *Bielawski v Bielawski*, 137 Mich App 587 (1984).

<sup>5</sup> *Anderson v Anderson*, 170 Mich App 305 (1988); *Mills v Mills*, 152 Mich App 388 (1986); *Phillips v Jordan*, 241 Mich App 17 (2000).

<sup>6</sup> *Overall v Overall*, 203 Mich App 450 (1994); *Scott v Scott*, 124 Mich App 448 (1983).

with their father outweighed the added enticements of a move to Colorado.<sup>7</sup>

- **Whether the move is inspired by that parent's desire to defeat or frustrate the parenting time schedule and whether the custodial parent is likely to comply with the substitute parenting time orders where he or she is no longer subject to the court's jurisdiction.**<sup>8</sup> The fact that the parents cooperate and are willing to encourage an ongoing relationship between the other parent and child is sufficient to indicate that the parent is not attempting to defeat or frustrate the parenting time schedule with the proposed move.<sup>9</sup> Similarly, a mother demonstrated good faith by her willingness to pay expenses that would be incurred in returning the child to Michigan for parenting time.<sup>10</sup>
- **The integrity of the noncustodial parent's motives in resisting the removal and the extent to which, if at all, the opposition is motivated by a desire to secure a financial advantage with respect to a support obligation.** Only the latter half of this factor has been referenced in recent court cases. It is unclear whether the omission is intentional or whether it has occurred as a result of continued citations to a case which included a concise summary of the factors but which did not address this particular factor.<sup>11</sup> In a case decided before the current test was adopted, the court examined a father's opposition to a proposed move to

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<sup>7</sup> *Dick v Dick*, 147 Mich App 513 (1985) (The children's father had formal parenting time on alternating weekends and every Wednesday evening and who also was a Cub Scout leader, took the children to hockey practices and games, coached their little league team, participated in their religious instruction and attended their parent-teacher conferences.).

<sup>8</sup> The statutory language for change of residence is similar but adds: "The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child." It is unclear whether this is an additional requirement or merely a codification of part of the third factor sometimes omitted in quoting the *D'Onofrio* test "the integrity of the noncustodial parent's motives in resisting the removal." See note 12 for cases examining a parent's use of parenting time.

<sup>9</sup> *Mills v Mills*, 152 Mich App 388 (1986).

<sup>10</sup> *Bielawski v Bielawski*, 137 Mich App 587 (1984).

<sup>11</sup> *Anderson v Anderson*, 170 Mich App 305 (1988).

California and found that he was a parent who was indifferent in exercising parenting time and would not be greatly put out or concerned by not being able to exercise parenting time afforded in the judgment if the other parent were to move.<sup>12</sup>

- **The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.** The new and old parenting time arrangements need not be equal in all respects. The requirement is that there be a realistic opportunity for preserving and fostering the parental relationship. Thus, replacing alternate weekends with one-half the summer vacation, all of Christmas vacation and alternate spring vacations was considered an acceptable alternative.<sup>13</sup> However, substituting two or more months per year plus frequent mail and telephone communication was not considered to be an adequate substitute for alternating weekends and every Wednesday evening when the father was also involved with the children in other extracurricular activities.<sup>14</sup> In order to allow a move, a court may fashion orders to facilitate the parenting time. Thus, a court could enter an order requiring the parties to share the cost of transportation.<sup>15</sup>

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<sup>12</sup> *Lem v Lem*, 12 Mich App 174 (1968) (The father had contested the move and sought custody despite having the children only 5 days in 4 years.). See also, *Lorenz v Lorenz*, 70 Mich App 356 (1976). (The court found that the children were being “horsed around by both sides.”).

<sup>13</sup> *Anderson v Anderson*, 170 Mich App 305 (1988). See also *Mills v Mills*, 152 Mich App 388 (1986) (The court approved replacing schedule of all but one weekend in a month and a six week summer vacation with plan for eleven weeks in the summer, a three day weekend each May and October, a week each Christmas, and each school break between the Christmas and Easter school breaks.).

<sup>14</sup> *Dick v Dick*, 147 Mich App 513 (1985).

<sup>15</sup> *Scott v Scott*, 124 Mich App 448 (1983).

When a parent asks the judge to approve a move of a child's legal residence to a point more than 100 miles from the earlier residence, the judge must consider the foregoing factors<sup>16</sup> and must also consider the following:

- **Domestic violence, regardless of whether the violence was directed against or witnessed by the child. If a parent seeking to change that legal residence needs to seek a safe location from the threat of domestic violence, the parent may move to such a location with the child until the court makes determination.**<sup>17</sup>

#### **Considerations for the Change of Domicile for the Investigator:**

- Will the change in domicile improve the quality of life for both the child and the relocating parent?
- Have both parents followed the court order for custody or parenting time?
- Is the parent who is requesting to move motivated by a desire to defeat or frustrate the parenting time schedule of the other parent?
- If the court grants the move, will it be possible for a parenting time schedule and other arrangements to be made that would provide an adequate basis for preserving and fostering the parental relationship between the child and

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<sup>16</sup> With the exception of the addition of a domestic violence factor, the factors are similar but are worded differently in the statute, just as they are sometimes worded differently in the cases. The most striking difference between the wording of the statute and case law requires the consideration of "The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule." This may be a reformulation of requirement that the court examine the integrity of the parent's motives in resisting the change by examining the previous use of parenting time, or it may be a new, and as yet undefined, element.

<sup>17</sup> No cases have yet been decided concerning this factor. See Tab B, Child Custody Factor k, for cases involving domestic violence.

each parent?

**Practice Tips:** It is necessary to determine if the same relationship could continue, if the court were to grant permission for the relocation.

- If the court does modify the current order for parenting time is it believed that each parent will comply with the modification?
- Is the parent who opposes the move doing so as a means to pressure the other parent to reduce the child support obligation?

If the investigator is required to conduct an investigation regarding changing the child's legal residence of 100 miles or more from the other parent, the previous considerations should be applied to the investigation with the addition of the following:

- Have there been any incidences of domestic violence, either directed at the child or witnessed by the child, by either parent?